United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 23, 2007

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Kelsey Hayes Co. a/k/a TRW 530-6050-120
Cases 8-CA-36737 & 8-CA-36957 530-6050-140

The Region submitted these 8(a)(5) cases for advice as to whether (1) from June 29 to December 5, 2006, the Employer unlawfully insisted upon allegedly permissive subjects, including a release of all legal claims against the Employer (overbroad release), to be executed by every unit employee (unanimity requirement); and (2) whether on December 5 the Employer unlawfully proposed a narrowed release with no unanimity requirement, but with substantially regressive economic terms, as a final offer with a fixed expiration date.

We conclude that the Employer met its obligation to bargain in good faith because 1) the Employer did not insist to impasse over, or otherwise condition agreement upon, any allegedly permissive subjects of bargaining, or otherwise bargain in bad faith from June 29 to December 5; and 2) the Employer's regressive final offer with a fixed expiration date was otherwise lawful, justified by the Employer's changed circumstances.

Background[1]

Beginning in June 2005, the parties voluntarily bargained for enhanced severance benefits related to the shutdown of its Ohio plant, i.e., severance benefits to be paid in addition to those already contained in the parties' collective-bargaining agreement. The Employer proposed that employees be required to sign a broad release in order to receive any enhanced benefits. The proposed release would cover "any and all obligations, claims, causes of action, liabilities, grievance or arbitration claims, and claims and demands of any kind which he now has or ever may

[1] See prior Advice memorandum, Kelsey Hayes a/k/a TRW, Case 8-CA-36737, dated February 28, 2007, for a detailed treatment of background facts.

have against the Employer (emphasis added). The Union did not initially object to the proposed release.

In late-May 2006,[2] about one third of the Employer's Ohio-based employees filed suit against the Employer alleging age discrimination and breach of contract claims arising from the plant shutdown. The employees also sued the Union, alleging that it had breached its duty to fairly represent them. Around June 29, the Employer added the unanimity requirement to its proposal. The Union objected and in Case 8-CA-36737 alleged that the overbroad release and the unanimity requirement were permissive if not illegal subjects of bargaining.

In the prior Advice Memorandum, we concluded that the proposed release was overbroad and therefore a permissive subject of bargaining. To the extent the unanimity requirement was intertwined with the overbroad release, a fortiori it was a permissive subject. However, there was no evidence that the Employer had unlawfully insisted to impasse upon the broad release plus unanimity. We therefore directed the Region to resubmit the case if the Employer narrowed the scope of its proposal and continued to insist on the unanimity portion.

FACTS

In October, the district court dismissed all but the state law age discrimination claim against the Employer, which the employees voluntarily dismissed to expedite their appeal.[3] After the district court dismissal, which occurred around the time the Employer closed the Ohio plant, the Union submitted another proposal for enhanced severance benefits. The Union reduced its demand for severance pay and told the Employer that it could still not agree to the proposed unanimity requirement.

On December 5, the Employer made what it characterized as a "final offer". The Employer proposed that it pay a uniform $1,000 in severance pay to any employee who signed a new, narrowed release which did not include the unanimity requirement.[4] The Employer stated that its offer would remain on the table until January 11, 2007.

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[2] All dates are in 2006, unless noted otherwise.

[3] The district court also dismissed the fair representation claim against the Union. The Sixth Circuit of Appeals later affirmed the district court's decisions to dismiss.

[4] The narrowed release provided that employees "release and discharge the [Employer] from any and all claims, charges,

On December 13, the Union rejected the Employer's offer but stated that it would agree to a previous Employer offer for cash payments, but without the unanimity requirement. The Employer did not explicitly reject the Union's December 13 counterproposal, but indicated during informal conversations with Union representatives that costs associated with the employees' lawsuit and the recent closure of the Ohio plant affected the Employer's bargaining position generally, and its December 5 proposal specifically. In an e-mail dated December 27 the Union reiterated its willingness to accept the Employer's August 15 proposal for cash payments, but without unanimity.

In a January 11, 2007, e-mail response to the Union's December 13 proposal and December 27 e-mail, the Employer advised the Union that it was disappointed with the Union's rejection of its December 5 offer, suggesting that the Union was ignoring the circumstances of that offer, i.e., the posture of the employees' lawsuit and the closure of the plant. The Employer stated that it was renewing its December 5 offer, and would keep that offer open until January 31, 2007. The Union did not respond to the Employer's e-mail, and the parties have not communicated about enhanced severance benefits since the Employer sent the January 11 e-mail.

ACTION

We conclude that the Employer met its obligation to bargain in good faith because 1) the Employer did not insist to impasse over, or otherwise condition agreement upon, any allegedly permissive subjects of bargaining, or otherwise bargain in bad faith from June 29 to December 5; and 2) the Employer's regressive final offer with a fixed expiration date was otherwise lawful, justified by the Employer's changed circumstances. The Region should dismiss the charges, absent withdrawal.

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demands, causes of action, losses and expenses of every kind, nature or description which employee ever had or now has arising out of or in connection with Employee's employment by or separation of employment." (Emphasis added).

I. The Employer Lawfully Pressed the Union to Accept Permissive Subjects

A. The Employer Has Not Insisted to Impasse Over Any Permissive Subjects

In collective-bargaining, either party is free to make proposals on permissive subjects, "to bargain or not to bargain, and to agree or not to agree."[5] Each "ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum"[6] nor insist upon the permissive subject as a condition precedent to entering any collective-bargaining agreement.[7] In addition, a party may not "continue to insist upon acceptance of the proposal to the point of impasse 'in the face of a clear and express refusal by [the other party] to bargain about the nonmandatory subject.'"[8] Insistence to impasse upon permissive subjects violates Section 8(a)(5) because it is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."[9] In contrast, a party may lawfully include a permissive proposal in a bargaining package and bargain even to the point of impasse over that package, if both parties voluntarily engage in bargaining over the permissive proposal.[10]

We affirm our conclusion in Case 8-CA-36737 that the overbroad release, which included the unanimity requirement, was a permissive subject. We assume, arguendo, that the narrowed release proposed by the

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[5] NLRB v. Borg-Warner Corp., 356 U.S. 324, 349 (1958).

[6] Detroit Newspapers, 327 NLRB 799, 800 (1999), citing Longshoremen ILA v. NLRB, 277 F.2d 681, 683 (D.C. Cir. 1960) and Taft Broadcasting Co., 274 NLRB 260, 261 (1985). See also, Pratt Tower, Inc., 339 NLRB 157, 170 (2003).

[7] Borg-Warner Corp., 356 U.S. at 349; Latrobe Steel Co. v. NLRB, 630 F.2nd 171, 179 (3rd Cir. 1980).

[8] Pleasantview Nursing Home, 335 NLRB 961, 963 (2001) quoting Union Carbide Corp., 165 NLRB 254, 255 (1967).

[9] Borg-Warner Corp., 356 U.S. at 349.

[10] KCET-TV, 312 NLRB 15, 15 (1993).

Employer on December 5 was also permissive.[11] Assuming that both releases and the unanimity requirement are all permissive subjects of bargaining, we conclude that the Employer has never unlawfully insisted to impasse or conditioned agreement upon those proposals. To the contrary, the evidence shows that the Employer has only lawfully pressed the Union to accept its proposals, the parties never reached impasse, and the Union never demanded that the Employer remove the proposals from the table.

First, neither the Employer nor the Union ever declared impasse and the parties' ongoing negotiations never reached an impasse. The parties' conduct has not demonstrated that at any time after the Employer proposed the permissive subjects, continued good-faith negotiations had exhausted the prospects for reaching an agreement,[12] or further bargaining would have been futile because both parties had reached the end of their rope.[13] Indeed, the parties' periodic and voluntary efforts to revise their proposals and explore various avenues for agreement belie any suggestion that negotiations ever reached impasse.

Second, the Employer never conditioned agreement upon acceptance of its proposed releases or the unanimity requirement, nor presented them as an ultimatum. Although the Employer maintained its demand for the release and unanimity from June 29 to December 5, it never indicated that those permissive subjects were essential prerequisites for any final agreement. The Employer's repeated proposals also did not amount to unlawful insistence because the

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[11] The narrowed release addresses only employees' past and current claims, but is still arguably overbroad because it would require employees to waive any claim against the Employer related to any aspect of their employment with, or separation from, the Employer. See generally discussion of Borden, Inc., 279 NLRB 396, 399 fn. 5 (1986), et al., at pages 3-5 of the prior Advice memorandum.

[12] Royal Motor Sales, 329 NLRB 760, 761 (1999), enfd. sub nom. Anderson Enterprises v. NLRB, 2 Fed. Appx. 1 (D.C. Cir. 2001), quoting Taft Broadcasting, 163 NLRB 475, 478 (1967), enfd. sub nom. Television Artists, AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

[13] AMF Bowling Co., 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d 1293 (4th Cir. 1995), quoting PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); Patrick & Company, 248 NLRB 390, 393 (1980), enfd. 644 F.2d 889 (9th Cir. 1981) (Table).

Union never tested the Employer's resolve to include them in any agreement.[14]

Third, there is no evidence that the Employer ignored any unequivocal Union declaration that either of the two releases or the unanimity requirement must be taken off the table.[15] Rather, the Union continued to bargain over terms for enhanced severance benefits, and throughout bargaining appeared willing to consider the broad releases as it had done in previous negotiations. With regard to the unanimity requirement, the Union's strongest language merely advised the Employer that the Union still could not accept its proposal of unanimity. Far from declaring unanimity off the table, the Union's conduct in bargaining suggested that, with sufficient inducement, it could have been persuaded to accept unanimity.

The Employer's December 5 "final offer" set to expire on January 11, 2007, did not constitute a declaration of impasse, but rather constituted lawful notice that the Employer intended to withdraw its proposal.[16] In any event, the parties were voluntarily bargaining over the permissive subject of enhanced severance benefits in addition to those already set forth in their collective-bargaining agreement. The Employer thus would have been free to terminate bargaining at any time without violating the Act.[17]

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[14] See, e.g., KCET-TV, supra at 15 (union did not insist to impasse over permissive subject even though it said there would be no deal without the permissive subject; employer never "tested" union's resolve).

[15] See, e.g., Good GMC, 267 NLRB 583 (1983) (insufficient evidence employer unlawfully insisted to impasse over permissive subject and union never demanded that employer remove permissive subject from the table).

[16] See Herman Brothers, Inc., 307 NLRB 724, 724 (1992)(union's failure to accept final offer by employer deadline not impasse where parties had not exhausted negotiations; employer "did not put the union to the test by announcing that it had issued its final proposal and was declaring impasse."). Compare White Cap, 325 NLRB 1166 (1998) (employer demanded acceptance of its proposal within reasonable deadline, and then lawfully proposed lesser terms after union failed to timely ratify).

[17] See, e.g., American Stores Packing, Inc., 277 NLRB 1656, 1673 (1986): "Principles of permissive bargaining preserve a party's right to unilaterally withdraw from such discussions at any time." See also, Borg-Warner, above, 356 U.S. at 349 (with regard to permissive subjects, either

The Employer's December 5 offer also did not result in an impasse. The Union rejected the offer and made a counter proposal, and there is no evidence to suggest that the Union could not have proposed, or that the Employer would not have considered, subsequent proposals for enhanced severance benefits that might bridge the parties' differences. In sum, the Employer at no time insisted to impasse over any alleged permissive subjects of bargaining.

B. The Employer Has Otherwise Bargained in Good Faith

The Union argues that, even if the Employer did not bargain to impasse from June 29 to December 5, over the overbroad release and unanimity requirement, the Employer during that period unlawfully "frustrated" or prolonged bargaining until closure of the plant and the district court's dismissal of the lawsuit improved its bargaining position allowing it to make the December 5 regressive final offer. We conclude that the Employer did not unlawfully prolong the parties' bargaining to achieve an improved bargaining position.

The Board has found that dilatory bargaining amounted to bad faith surface bargaining where evidence indicated that the employers' stalling tactics were designed to inhibit or even prevent agreement.[18] There is no evidence that the Employer's proposals here were intended to inhibit or avoid reaching agreement. To the contrary, the Employer acknowledged its potential liability in the employees' lawsuit and repeatedly pressed for an agreement that would limit, if not eliminate, that liability. The Employer's initial attempt to eliminate all liability related to any litigation by proposing an overbroad release may have been ambitious, but there is no evidence that the Employer intended to frustrate or prevent an otherwise useful agreement.

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party is free to bargain or not to bargain, and to agree or not to agree). We note, however, that the Employer has not yet indicated an unwillingness to bargain for an agreement.

[18] See, e.g., Talbert Manufacturing, 250 NLRB 174, 180 (1980) (employer statements indicated that employer unlawfully stalled bargaining to stoke employee disaffection and prompt a decertification vote); U.S. Ecology, 331 NLRB 223, 225 (2000) (employer statements indicated that dilatory tactics intended to prevent agreement and bring about union's ouster).

Finally, considering only those proposals the Employer made during this limited time period ignores the Board's well-established practice of considering the totality of circumstances when analyzing allegations of bad faith bargaining.[19] The Employer's conduct during this period is insufficient to establish bad faith bargaining. The Union does not allege that the Employer bargained in bad faith before June 29. As discussed above, we find that the Employer thereafter generally was attempting to reach an agreement with the Union to limit its exposure to liability. The Union has not alleged, and the Region's investigation has not disclosed, any other evidence showing that the Employer otherwise bargained in bad faith.

II. The Employer's December 5 Regressive Proposal

Regressive bargaining is not per se unlawful; it is unlawful only when used to frustrate agreement.[20] Revised or regressive proposals are clearly lawful where they reflect an enhanced bargaining strength,[21] or efforts to press a union to come to an agreement.[22]

The Employer's last offer reflected its improved bargaining position from changed circumstances. When the Employer feared substantial liability because of the pending employee lawsuit, the Employer was willing to offer substantial sums in exchange for a broad release that would cover all the allegations of the suit. The district court's dismissal of the lawsuit greatly reduced the Employer's risk of liability, and all but eliminated any incentive the Employer might have had to offer employees enhanced benefits. The December 5 proposals, therefore, are lawful; they merely reflect the Employer's changed

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[19] See, e.g., Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

[20] Telescope Casual Furniture, 326 NLRB 588, 589 (1998).

[21] See, e.g., Berry-Wehmiller Co., 271 NLRB 471, 472 (1984) (employer's regressive proposals lawful in light of its improved bargaining position after successfully weathering strike).

[22] Oklahoma Fixture, 331 NLRB 1116 (2000) (employer taking concessions off table and renewing original proposal constituted lawful hard bargaining and not unlawful attempt to avoid reaching agreement); See also, Telescope, 326 NLRB at 589 (employer lawfully used regressive offer to pressure union to agree to primary offer).

circumstances, and do not indicate that the Employer was attempting to frustrate or prevent agreement.

In sum, while the Employer pressed the Union to accept alleged permissive proposals, there is no evidence that the Employer at any time unlawfully insisted to impasse over permissive subjects or otherwise bargained in bad faith. The Region should dismiss the charges, absent withdrawal.

B.J.K.